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Staigg, supra. And it was held in *Massie v. Heiskell*, 80 Va. 789, that where a vendee had got more land than he bargained for, the vendor had a lien on the excess for the additional amount due.

See generally, *Brown v. Lamphear*, 35 Vt. 252; *Mead v. Johnson*, 3 Conn. 597; *Church v. Steel*, 42 Id. 65; *Gates v. Winslow*, 1 Mass. 65; *Williams v. Hathaway*, 19 Pick. 387; *Pick-*

man v. Trinity Church, 123 Mass. 1; *Renshaw v. Lefferman*, 51 Md. 283; *Cochran v. Pascault*, 54 Id. 1; *Chamberlaine v. Marsh*, 6 Munford (Va.) 283; *Gilmore v. Hamblin*, 37 Ark. 626; *Hill v. Bush*, 19 Id. 522; *Griffith v. Townley*, 69 Mo. 13; *McDonald v. Lynch*, 59 Id. 350.

LUCIUS S. LANDRETH.

Philadelphia.

Supreme Court of Pennsylvania.

THE ROYAL INSURANCE COMPANY v. BEATTY.

Where there is no duty of speech, there can be no harmful omission, from mere silence.

Where a policy of insurance against fire had expired, and the insured asked at the office of the insurance company to have his policy renewed, but received no answer, and went away, supposing his policy was renewed: *Held*, that silence to a question, is different from silence to a declaration of a fact, and is evidence either, that the question was not heard, or, that the request would not be complied with.

When a question is asked embodying a request to make a contract, it is the questioner's duty to secure an answer, as silence is not assent in any sense, and cannot afford a footing for an inference that the parties have contracted.

WRIT of error to the Court of Common Pleas, No. 2, of Philadelphia county.

This was an action to recover for a loss by fire, occurring on the 10th of January, 1887. The Royal Insurance Company had insured the burned premises, by a policy which expired on the 6th of January, 1887. On the 5th of January, a clerk of the broker having the policies in charge, was directed to have this renewed, with others expiring on the 6th of January. He did call for this purpose, intending to have this policy *made binding*: which means, renewed, or agreed to be deemed in force, till it was ascertained that there would be a change in the rate, and then the insured would determine whether to let the policy drop or renew. The clerk had a memorandum of other policies for other people with him, in which he wished to have altered the privilege of working by night. He testified that he spoke to the clerk of the insurance company whose business it was to

make the extensions and renewals, and asked to have this policy *bound*. He also asked to have the night clause extended to the other policies. Upon the request to renew or bind the policy in question, he admitted that the clerk said nothing and did nothing, but he assumed or believed he had assented, and so reported to his employer. As to the night clauses, a sharp discussion took place. The defendants gave evidence that the clerk who was asked to renew the policy, had heard nothing of the request to insure. And they offered testimony to corroborate this, and that the clerk and the insurance company had acted upon the belief that the policies were not renewed and were not in force, before the time of the fire. This evidence was rejected, and the case was treated as a mere question of memory, and which of the clerks was accurate.

Morton P. Henry and *Richard C. McMurtrie*, for plaintiff in error.

Geo. H. Earle, Jr., and *Richard P. White*, for defendant in error.

GREEN, J.—We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation. But in any point of view it is difficult to understand how a legal liability can arise out of mere silence of the party, sought to be affected, unless he was subjected to a duty of speech which was neglected, to the harm of the other party. If there was no duty of speech there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies

against the defendant, but they had expired before the loss occurred and had not been formally renewed. At the time of the fire the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk who took the two policies in question along with other policies of another person to the agent of the defendant to have them renewed and this is the account he gives of what took place. "The Royal Company had some policies to be renewed and I went in and bound them. Q. State what was said and done. A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The Court—Who were the policies for? A. For Mr. Beatty. The Court—That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The Court—What did they say? A. They did not say anything, but I supposed that they went to their books to do it. They commenced to talk about the night privilege and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about those policies (Robert Beatty's) at that time? A. No, sir, I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies, and the night privilege for Mr. Priestly?' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir, and I asked the Royal Company to bind Mr. Beatty." The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says, is, that he *asked* the defendant's agent to *bind* the two policies, as he states at first, or to renew them as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the

inference of an admission of the truth of the declared fact. It would then be only a question of hearing which would be chiefly, if not entirely, for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done. How then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court and not for the jury, for if there may not be an inference of the controverted fact the jury must not be permitted to make it.

What has thus far been said, relates only to the effect of the non-action of the defendant, either in responding, or doing the thing requested. There remain for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was *his* duty? Undoubtedly to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him and the defendant had not agreed to do so, he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer but he does not repeat the question. He too is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive and without it he has no status. But he desists and does and says nothing further. And so it is that the whole of the plain-

tiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract. The other facts proved and offered to be proved, but rejected improperly as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them since the other views we have expressed are fatal to the plaintiff's claim.

Nor do I concede that if defendant heard plaintiff's request and made no answer an inference of assent should be made. For the hearing of a request and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street and hears the request but makes no answer it certainly cannot be inferred that he intended to give them. In the present case there is no evidence that defendant heard the plaintiff's request and without hearing there was of course no duty of speech.

Judgment reversed.

In the principal case, the court say that the imposition of contractual relations by mere silence, is exceptional and of extremely rare occurrence, and that no perfect instance of the kind had been mentioned in the argument, the citations for the defendant in error having in them some other element towards establishing the contract, than mere silence.

Wharton on Contracts, § 6, was the first of these citations, the particular words being,—“Admission by silence, also, as well as admission by speech, may have a contractual force, and may bind as effectually as words.” The author immediately subjoins a reference to another part of his work, where he has treated of suppression of a fact, and harmonized all the cases in the statement that suppression which estops, is not mere non-action, but a perversion in telling, which

amounts to a distortion of the truth. (§ 217.)

In the principal case the desired extension of the policy was requested in so many technical words and no answer given to the request, so far as it related to the policy in suit, and only an inference arose in the mind of the questioner that the written memoranda made, did relate to all the policies, including the one in suit. The only perversion which could arise, would be from a failure to answer the whole of the question, and the court, held in effect, that this was no perversion of the truth, because the question might have been repeated until some answer could be obtained in relation to the Beatty policy. In other words, mere silence would be ineffectual unless coupled with fraud or action. This is sustained by the authorities following:

Ward v. Hobbs, L. R. 4 App. C. 13, in the H. Lds. affirming s. c., L. R. 3 Q. B. D. 150, which reversed s. c., L. R. 2 Q. B. D. 33 (1878), was a case where some pigs were sold at public auction, with express notice that no warranty would be given and that the pigs, with all faults and errors, if any, must be paid for and removed immediately after the sale. Not a word further was in the case, and the whole question was one of conduct, which the purchaser endeavored to convert into a representation. CAIRNS, Ld. Chancellor, affirming the unanimous opinion of the Court of Appeal, held that there must be something as clear in statement in an opposite direction and consequently, no such implication of a representation could be raised. Otherwise, in the language of Lord O'HAGAN, there would be established a new principle, and the recognition of a legal presumption heretofore unknown. And this case was expressly decided in agreement with the principles laid down in Story on Contracts, §§ 643, 644 (5th ed. 1874).

Cogel v. Kniseley, 89 Ill. 598 (1878), was an omission to call attention to a patent defect in the bed-plate of a second-hand steam engine. The seller was truthful in saying that the engine would do certain work and the court held that he was not bound to know whether, if the patent defect had been seen, the sale would have been made. He was only bound to see that he did or said nothing to deceive and that he disclosed all latent defects. To the same effect is *Keates v. Cadogan*, 70 Eng. C. L. (10 C. B.) 591 (1851).

Steel v. St. Louis S. & E. Co., 106 U. S. 447 (1882), is interesting in connection with the feature of the principal case, that there was no existing contract at the time the insurance company was asked to bind the Beatty

policy. Mr. Beatty knew he had no contract and was asking for one: so here, the plaintiffs in error attempted to invoke the principle of estoppel, applicable to a case where the owner of real estate stands by and sees improvements erected on his land by parties believing that they have title to the land. This salutary principle was denied to be applicable to the case in hand, because the parties making the improvements in this case, were acquainted with the fact that they had no title. See also, to the same effect, *Brant v. The Virginia C. & I. Co.*, 93 U. S. 327 (1876); s. c., 16 Am. L. Reg. (N. S.) 403; *Henshaw v. Bissell*, 85 Id. 271 (1873); *N. Y. Rubber Co. v. Rothery*, Ct. App. N. Y. November 28, 1887; *Schaidt v. Blaul*, Ct. App. Maryland, November 18, 1886; *Carpenter v. Osborn*, Ct. App. N. Y. June 15, 1886; *Kirk v. Hamilton*, 102 U. S. 68 (1879); *Simplot v. Chicago, etc., R. R. Co.*, U. S. C. Ct., N. Dist. Iowa, 1883; 5 McCreary, 175; s. c., 16 Fed. Rep. 363.

The preceding authorities are all cases where the defendant did not act, as in one aspect of the principal case. The following reach the same result, notwithstanding the fact that they arose from some partial action, as in the other aspect of the principal case.

Conniham v. Thompson, 111 Mass. 270 (1873), was an alleged estoppel from the course of conduct of an action at law to recover damages for breach of an agreement to convey certain land. In prosecuting this action at law, the plaintiff had attached the land in question as the property of the vendor, who was obliged to give bonds with surety before he could raise money on mortgage of the land. Afterwards, the plaintiff filed a bill against the vendor, for specific performance, and the court held, that the laying of the attach-

ment in the previous action at law, and the putting of the vendor to the trouble of giving bonds, did not estop the plaintiff from saying that he still wished to buy the land. The remedies were not inconsistent, though they were alternative, for they were both remedies in affirmance of the contract. To the same effect, though *in pais* and not in the conduct of a lawsuit, see *Beaupland v. McKeen*, 28 Penna. State R. 124 (1857); *Baker v. Humphrey*, 101 U. S. 494 (1879).

The effect of silence is further dwelt upon by Mr. Wharton, in the same immediate connection by a reference to the implied acceptance of a proposal, arising from a course of business established between the parties. (§ 709.) But such an implication will only be of use in elucidating a contract already in existence, and cannot be introduced to establish a new contract. (*Id.*) This is decisive on the point before the court, for the Beatty policy was expiring when the insurance company was requested to extend it: see the following cases.

This may be illustrated by *Flint v. Johnson*, S. Ct. Vt., May 28, 1887, where one partner put a construction on the partnership articles which was known to the other partners, and having acted upon his construction without objection, that became the law of the case. See also, *P., W. & B. R. R. Co. v. Dubois*, 79 U. S. 47 (1870).

Northwestern M. L. I. Co. v. American, S. Ct. Ill., January 25, 1887, was a case where the insured entered upon an occupation forbidden by his policy of life insurance. The company knew of this and regularly demanded the premiums, which were paid, and receipts given in the usual form, until the insured's death from an accident, whilst engaged in the forbidden occupation. The court

held that the parties were equally cognizant of the conditions of the policy and that the payment of the premiums merely saved the policy from forfeiture from that cause and did not operate to waive the provision against the employment. It would not make a new contract to that effect.

Bodine v. Killeen, 33 N. Y. 93 (1873), is a type of case which appears to be an exception to the necessity of requiring an explanation or a reply to a question, before an estoppel or a contractual relation could arise. There, a married woman was held to the appearance which she gave to a course of dealing, which had continued through her neglect. She had for many years, carried on the grocery business, purchasing from the plaintiffs on credit. Her husband was her agent until taken sick, when, for a short time, she made her own purchases. On her husband's recovery, she transferred the business to him, without giving any information of the change, or the revocation of his agency. He immediately commenced to buy from the plaintiffs on credit and the court held the wife liable for the bills contracted because she had given no notice of the change in the business. But it is clear that this will not affect the ruling of the court in the principal case, because the liability was not simply the result of silence on her part, but, even more, of action on the part of the plaintiffs which she was bound to stop by a notice. In the principal case there was no course of dealing between Beatty and the insurance company and the case was not tried on the theory of a course of dealing between the agent of Beatty, in respect to other policies issued by the insurance company. Such a theory was probably considered untenable. Besides,

nothing was done by Mr. Beatty, and the insurance company was not notified that Mr. Beatty had failed to reinsure because he understood that his policy had been renewed.

Chisman v. Count, 2 M. & G. 307 (1841), is interesting in this connection, as it was cited to the court, in the principal case. There, an account was shown to A. and he objected to one of the items but said nothing in respect to the others. The English Court of Common Pleas, on a motion for a new trial, held that such silence was evidence from which the jury might infer an account stated and therefore sustained the verdict for the amount mentioned in the account. Mr. Wharton (*Contracts*, § 779) cites this case, as sustaining the principle that an implied promise must be in the form of a specific admission, to amount to an account stated in the fiction of the old forms of pleading. As cited to the court in the principal case, it was meant to sustain the position that when a number of policies were offered for extension, and some altercation occurred over one and nothing was said about another, that this other might be considered as extended. But the cases differ: the account was presented, that its items and total might be admitted and certain steps in pleading eliminated in the event of a suit. Not so in the principal case: there the policy of insurance was presented as evidence of a contract which had expired, but which was to be made part of the evidence of a new contract, if a contract was agreed upon. There could be no doubt of the terms of the new contract, if made; but the question in the principal case, was, whether any new contract had, in fact, been made. Again, in another view, the items of the account made one whole, that is, the account. But the several policies

when bound, made merely several new contracts and as to admissions inferred from acquiescence, not merely to questions, but even to statements of others, the maxim, *Qui tacet consentire videtur* is to be applied with careful discrimination: 1 Greenleaf, *Ev.* § 199. That is, when an account is presented, the whole as well as the parts, are necessarily before the mind. When, however, a number of things are asked for at once, that which is least discussed, is naturally the least considered, and a matter barely mentioned, may not be attended to at all, in the thought of the other policies. It is reasonable to hold the questioner to the asking of some question, in addition, which would secure at least, a comprehensive, though general answer.

Again, silence which estops, must arise from actions which induce the doing or omitting to do an act, and a loss ensues. (*Wharton, Contr.* § 6.) This is illustrated by fraud, which has been successfully concealed, although the relations of the parties require disclosure, as a duty. (*Id.* § 289.)

Devine v. Edwards, 87 Ill. R. 177 (1877), may be taken as an illustration. Milk was sold by the gallon, but delivered in cans supposed by the buyer to contain eight gallons each. On this supposition payments were made until the buyer finally declared that he had paid for more milk than he received and the court allowed him to recover on proof of the amount of shortage in the cans. The seller was held to see that his cans contained the full amount, and the buyer was not held to the exercise of vigilance such as an ordinarily prudent man might be expected to use. In the principal case, there were no relations existing between the parties, further than a custom to bind policies upon request. Relying upon this custom,

Mr. Beatty's agent requested the binding of the policies, and went away from the office of the insurance company without receiving any reply. This is all: there was nothing brought home to the knowledge of the insurance company whereby they were in the slightest degree informed that he would not apply for any other insurance because of the belief that they had renewed his policy. Such knowledge and action are essential to an estoppel, on general principles: *Phila. & Balt. Cent. Ry. Co. v. U. S.*, 103 U. S. 703 (1880.) So, in the Illinois case just cited, the weight of the evidence, contradictory and voluminous as it might be expected to be, established that the seller knew that the buyer was paying in the belief of the full size of the milk cans. This created a duty to have the cans of full size.

Fox River Flour and Paper Co. v. Kelly, S. Ct. Wisc., December 13, 1887, further illustrates this particular kind of silence, which, from the relations of the parties, required speech to avoid incurring an obligation; it was a case where the principle was confidently invoked. The plaintiff sought to restrain the diversion of water power, and the defense was put on the ground that the power was necessary for the operation of the defendant's mill; that the plaintiff knew this and had stood by in silence, whilst the mill was being erected, on the raceway by which water power was furnished artificially, through adjoining lands. The court said that such water rights differed from those in water naturally flowing over land in that they required some grant, actual or presumed, and that no grant could be presumed from silence, because it might well be, that the defendants expected to lease the power. There was nothing in the case to show what water rights were claimed by the defendants. And

indeed, a threatened invasion of rights will not necessarily call for action. Thus, an owner may view in silence the construction of a work, advancing towards his land and evidently intended to cross it. When it affects him, it is time to act: *Stewart v. Stevens*, S. Ct. Col., November 18, 1887. So, in the principal case, Mr. Beatty did not positively ascertain what the insurance company would do with his policy and also did not communicate to them what he thought or wished to have done, beyond the mere asking of a question.

The substantial difference, therefore, between preferring a request and making an assertion, is the resulting effect in the mind of the person speaking: if he is allowed to labor under a mental deception by the other party; that is if the party keeping silence, perceives not a desire but an intention to act in a certain way on the part of the speaker, silence would be unjust and the speaker must be put into the expected position. Thus, where one undertook to purchase a picture and desired to know to whom it had belonged, the agent of the seller declined to name the owner but knew that the buyer believed the picture to have belonged to A. because the agent had been selling also for A. The sale was set aside, because it had occurred under a deception: *Hill v. Gray*, 1 Starkie, 352 (1816).

This substantial difference between a question and a statement may be made clearer by considering for a moment that not even every statement will affect the hearer: thus, a second mortgagee, though made a party to the foreclosure of the first mortgage, is not bound to insist upon a foreclosure of his mortgage; he may remain silent and inactive; he is under no moral or legal obligation to

do anything, for his rights remain until a decree is entered against him: *Simmons v. Taylor*, U. S. C. Ct. S. Dist. Iowa, May 12, 1885, 23 Fed. Rep. 855.

So, a mortgagee, immediately after the execution of his mortgage, heard the mortgagor state to the justice of the peace, before whom the instrument had been executed, that it was without consideration, but nothing was said to him personally and he was held not to be required to speak: *Perry v. Dow*, 59 Vt. 61. (1887). That is, the mortgagee was not bound to interfere in the conversation; see 1 Grnlf. Ev. § 197, and citations in note (c.) *i. e.*, *Drury v. Hervey*, 126 Mass. 519 (1879), and *Whitney v. Houghton*, per MORTON, J., 127 Id. 527 (1880). And, conversely, a third person cannot hold parties to a suit, liable for his actions, induced by the testimony in that suit: *Hobbs v. McLean*, 117 U. S. 567 (1885).

From the above review of the citations for the plaintiff in error, it is seen, that the contention in the principal case was altogether to make out a new contract from the asking of a question; and necessarily so, for Mr. Beatty was the actor, and an estoppel *in pais* would not have been useful, as this is merely available for protection and cannot be a weapon of assault: per SWAYNE, J., *Dickerson v. Colgrove*, 100 U. S. 578 (1879).

The exceptional instances of contracts made without speech, are all accompanied by action of some kind. Thus, to enter a railroad car and take a seat, in silence, is one of Mr. Wharton's own examples, in the section so often quoted. (§ 6.) This imposes upon the party the obligation to pay his fare. It is reciprocal to the obligation of the carrier, who is required to afford reasonable accommodations for all who apply for passage, at the stipulated hire or fare: Angell, Car-

riers, §§ 524, 525; Thompson, Carriers of Passengers, page 29, § 5 (ed. 1880.) (See *infra*.)

Hence the decision here under annotation, falls within the principle, that mere inaction cannot be construed into an assent. As pointed out by the court, nothing occurred to put the insurance company on their guard against the effects of any proposed action or inaction by Mr. Beatty. They were simply asked a question and they did not answer. No contractual relation could arise under such circumstances, because a proposal must be definitely assented to, and mere failure to refuse, is not enough: Wharton, Contracts, § 22. This is necessarily true, because he who makes the proposal is himself not bound by the mere act of proposing, and is under no obligation whatever, to formally withdraw the proposal. Being without consideration, it is only a *nudum pactum*: *Coleman v. Applegarth*, Ct. App. Maryland, November 18, 1887; *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463 (1876); Story, Contracts, § 495. Perhaps this will appear more distinct after a moment's reflection upon the instance of a passenger taking a seat in a railway car: *supra*. His right to do so and thereby assume the reciprocal obligation of paying his fare, arise from the law, which compels all in public employment, such as common carriers, to keep up a constant though reasonable, offer to contract to perform their public duties; *e. g.*, carry a passenger's personal baggage with the passenger, although no contract has been formally entered into at the time when the transportation of the passenger begins: *Hannibal, etc., R. R. Co. v. Swift*, 79 U. S. 262 (1870.)

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